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Brief to the Government of Ontario

Respecting

Widow's Rights to Family Property

Ontario Status of  
Women Council  
August, 1980



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## Ontario Council on the Status of Women

### BRIEF: Widows and Family Property

On the death of a spouse, widows and widowers are not guaranteed equitable sharing of assets accumulated during marriage, although such guarantees have been legislated for divorced and separated persons under the Family Law Reform Act, 1978.

The Council has supported and continues to support the commendable efforts of the Province of Ontario to legislate equity in property rights for the women of this province. The Family Law Reform Act proclaimed March 31, 1978, was extremely important for Ontario women. It took the unprecedented step of sharing some of the family's assets, those it defined as "family assets", and often also business and investment property, between husband and wife. It was unprecedented because before the Act was proclaimed in force March 31, 1978, a spouse had NO right to claim OWNERSHIP OF PROPERTY because of the marriage relation. Before March 31, 1978 in Ontario, a spouse was NOT ENTITLED to say the matrimonial home is "half mine".

All a woman could claim was periodic amounts sufficient to support her in reasonable fashion, provided she was not a proven adulteress.

The Family Law Reform Act was the first legislation in Ontario, and indeed was the forerunner in all of Canada,

to recognize the husband and wife as economic partners in the family.

The Family Law Reform Act entitles women on marriage breakdown to share in the fruits of the marital labours. The preamble to the Family Law Reform Act sets forth the essential rationale for the Act:

"Whereas it is desirable to encourage and strengthen the role of the family in society;  
And whereas for that purpose it is necessary to recognize the equal positions of spouses as individuals within marriage and to recognize marriage as a form of partnership;"

The Family Law Reform Act then stated in section 4(5) that the goal of family law reform was to recognize that "child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship is joint contribution ... entitling each spouse to an equal division of the family assets ..."

To recognize that joint contribution, the Family Law Reform Act provides for an equal division of family assets. "Family assets" are defined as property (used for shelter, transportation, recreation and household purposes) owned by one or both spouses and ordinarily used or enjoyed by them or their children while they reside together.

The Act also provides an opportunity to seek a share of property not defined as family assets, and a disproportionate share of family assets, based on equitable considerations.



However the Family Law Reform Act only applies when the marriage has broken down and a court application for property division has been made while both spouses are living. It does not protect a woman who may have remained in a marriage with a husband who was not prepared to share with his wife the fruits of their labours during their married life together.

The crucial issue is why limit this to marriage breakdown? Can we safely assume that still-married spouses will "take care of each other"? Is it fair to assume that? There is no question that the Family Law Reform Act limits its benefits to situations of marriage breakdown and does not apply upon death. The real question is: Why not?

The companion Succession Law Reform Act also in effect March 31, 1978, was supposed to protect widows, to step in where the Family Law Reform Act leaves off, but it does not provide the same benefits as does the Family Law Reform Act. There is an enormous gap between the two statutes in their protection of women's property rights, in the recognition of women's rights to ownership of property because of their contribution to the marriage.

The woman whose husband leaves her everything in his will, or with whom all property was held in joint tenancy will not have a problem. The woman who will suffer is the one whose husband having held all the family's property in his name has disinherited her. She will not be entitled to the Family Law Reform Act's system of distribution. Her only recourse is a claim for support

under the Succession Law Reform Act. (unless she made a dollar contribution to the purchase of specific properties, in which case she may have a claim that the estate of her husband holds the land partially in trust for her.)

The following example illustrates our concern. A husband and wife, married in 1940, live together unhappily. The matrimonial home is held in the name of the husband, as is all other property accumulated by the family since 1940. The wife holds a full-time job as a clerk, earning \$8,000.00 per year. The husband dies, bequeathing the \$100,000.00 matrimonial home (in which the wife resides) to one brother, and all the rest of the property to another brother.

The only recourse available to this widow would be to apply under The Succession Law Reform Act. Her application, would be as a "dependant" to whom her husband was providing support or was under a legal obligation to provide support immediately before his death, and she would have to prove that her husband had not made "adequate provision" for her "proper support". The court has the discretion to force the husband's estate to fulfill the husband's obligations to his dependants, and may order any part of the estate to be available for the support of those dependants.

The Succession Law Reform Act definitely does not deal with entitlement to property. It does not create property rights. Its intention is only to relieve hardship on a disinherited family member, to assist a person "in need", rather than

giving a widowed spouse entitlement by virtue of marriage to share in the ownership of property.

The women of Ontario are entitled to what is coming to them, what is their due. Forcing a woman to apply for her interest in her home as a dependant, a "person in need", puts her in the position of a mendicant, rather than one who is simply entitled by virtue of her marriage, to share in the ownership of that home.

#### Applying The Succession Law Reform Act

The Succession Law Reform Act states that where a deceased has not made "adequate provision" for the "proper support" of his "dependants" or any of them, the court on application may order whatever provision it considers "adequate" made out of the deceased's estate for the proper support of the dependants.

#### "Adequate Provision"

The Succession Law Reform Act delineates the court's discretion in deciding whether adequate provision has been made for the dependant. The test is the applicant's need, and not whether or not the testator has been fair in his disposition of ownership rights to property in his name.

The factors which must govern the court's discretion in deciding the application certainly include more than "need". Whether or not the applicant has assets of her own and whether or not she has the capacity to provide for her own support will



be major factors in deciding whether or not to share with her the property in her husband's name. The implication is that if she does have assets and the capacity to provide for her own support, she is not entitled to an award as a dependant. The court also looks at "the measures available for the dependant to become financially independent and the length of time and cost involved to enable the dependant to take such measures". The standard therefore seems to be the ability of the dependant to support herself, and not entitlement as a married person who helped accumulate the assets in which she is seeking to share.

The Succession Law Reform Act also says that the court should consider "the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions" and "the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property, business or occupation". These are factors which should entitle the dependant to a share of ownership of property, and not merely further justification for receiving an amount of support in accordance with need.

#### "Proper Support"

A court must determine what is "proper support" of a spouse. Since the Act was passed, the only case of which the Council is aware which determined this question was Re Davies and Davies, (1979) 27 O.R. (2d) 98, a decision of Surrogate Court Judge Dymond. We are aware that in that case "proper support" was



defined to mean more than enough to enable a dependant to live decently and comfortably according to their station in life, but also sufficient in appropriate circumstances to allow for non-essentials or luxuries. In that case, we are aware that the court recognized a widower's right to live in the matrimonial home for his lifetime, although he was not given a right of ownership. The court felt that his deceased wife had not provided him with proper support by not providing a house since during her lifetime, she had provided a home. The court however did not award him ownership of a share of that home in recognition of his contribution to the marital relationship.

The court in that case, went so far as to add conditions to the order that the husband might use and occupy the house for himself "and for any other person he may wish to have live with him, provided that such person shall not be a "spouse" within the meaning of the Family Law Reform Act 1978". The court thereby cautioned the widower that he retained his right to live in the matrimonial home only so long as he did not remarry or have a woman living with him in circumstances analagous to remarriage. Just as a person's sexual relationships is out of date in determining a woman's rights and needs, so also is it out of date in determining a man's. Surely in that case and others, a spouse is entitled to a share of the ownership of property accumulated during marriage, simply by virtue of contributions made during the marriage. For the court and the legislature to apply a test of "need" or whether or not the

person is having a sexual relationship is surely irrelevant and inappropriate.

It is clear that the availability in The Succession Law Reform Act of the court's option to grant a life estate in property to a spouse can rectify inequities in some cases. It is clear also that the right of a court to grant lump sums can rectify inequities in some cases. In fact, the range of relief available to the court under The Succession Law Reform Act is admittedly broad.

A court in making provision for support may make provision out of income or capital or both, and order any of periodic payments, lump sum, property transfers, possession of property, lump sum, charge on property.

The principle remains. Spouses should be entitled as of right by their contribution to their marriage to share OWNERSHIP of assets accumulated during marriage. They should not have to apply to a court. They should not have to prove "need". They should not have to beg for rights which belong to the divorced or separated persons, simply because their marriage broke down.

The Council passed a resolution

"THAT THE Family Law Reform Act's system of division of property should be available to widows and widowers so that assets are shared equitably on the death of a spouse."

The Attorney-General responded (see Appendix) stating that consideration had been given when the Family Law Reform Act and Succession Law Reform Act were introduced to making the Family Law Reform Act system of division of property available on the death of a spouse. He further indicated that since such problems did not usually arise on death, legislation was not needed which would interfere so drastically with a persons freedom to dispose of his property by will.

The Council feels that we do not know the incidence of such problems and would have no way of knowing. Certainly, we think it can be safely stated that most husbands will provide reasonably for their wives, and will want to share with them the basic fruits of the marriage, like the matrimonial home. But a woman should not be obliged to depend on the good will of her husband. The wife who persists in her marriage only to be disinherited, needs protection and surely the Province can extend existing legislation to provide it. Surely it is more appropriate to award an automatic share of property accumulated during the marriage to every woman, rather than merely to those who break up their marriage.

The Council does not regard legislation of property rights for widows as undue interference with testamentary freedom. To interfere with the testator's freedom to dispose of his property continues a practice in the 20th century in all common-law jurisdictions including Ontario. New Zealand was the first jurisdiction to pass dependants' relief legislation in 1908.



The intention of such legislation was to relieve hardship suffered by members of a deceased's family who were disinherited by the deceased in his will. To interfere sufficiently to provide to women their right to property accumulated by them during the marriage would be an appropriate intrusion. The important question of principle is: What economic benefits of marriage do we in 1980 wish to confer on a spouse? If we wish to recognize property rights, then widows should also share as of right, and not as a product of destitution.

The Attorney-General was concerned that to make the Family Law Reform Act applicable on death would mean executors would be unable to distribute property to beneficiaries such as children until a court hearing had been held. The Council is sure that the legislation can readily allow for the possibility of an interim order to pay income for the benefit of children or others while the estate is being reviewed by the court. The possibility of a procedural delay we do not consider sufficient reason to deny a widow her property rights.

The Attorney-General states that he is not aware of specific cases where the Succession Law Reform Act has been insufficient to meet the needs of a disinherited widow. The Council feels that there is not likely to be a "cause celebre", a dramatic case which commands headlines, and public attention and demonstrates the inequity. A working woman with some means of support may be advised by a lawyer not to press a claim as a "dependant" under The Succession Law Reform Act. In most

such situations, she would be fighting another family member for a share of the estate, and many persons would wish to avoid family conflict.

The Ontario Government should be helping stabilize family relationships. The Council feels that with legislation recognizing ownership in family assets only for divorced and separated persons, the government is almost rewarding marriage breakdown and punishing the persistence of the unhappily-wed.

The Council wants justice for widowed persons, and proposes that the only way to provide it is to establish rights to ownership of matrimonial property by widowed persons either within the Family Law Reform Act or the Succession Law Reform Act. Two alternative solutions present themselves:

A. Legislate Family Law Reform Act Part I for widows

The Government should add to the Succession Law Reform Act the right of a widowed person to claim on the death of a spouse a share of property ownership by virtue of direct and indirect contributions to the marriage, carrying into the Succession Law Reform Act the same rights for widows that exists for divorcees and separated persons under the Family Law Reform Act Part I.

(see pages 1 and 2 of this Brief for a description)

B. Apply Intestacy Rules

The Government should add to the Succession Law Reform Act assurances to the widowed person to receive the same minimum

entitlement that would be available, had the deceased failed to leave a valid will. Currently, this means that where a person dies without a valid will and is survived by a spouse but no children, the spouse is entitled to all the assets. If survived by a spouse and one child, the spouse receives the first \$75,000 and then half the estate over that. If survived by a spouse and more than one child, the spouse receives the first \$75,000 and one-third of the estate over that and the children divide the balance amongst themselves.

#### S U M M A R Y

The Ontario Council on the Status of Women had adopted the following resolution:

THAT THE Family Law Reform Act's system of division of property should be available to widows and widowers so that assets are shared equitably on the death of a spouse.

The Family Law Reform Act, 1978, has recognized that child care, household management and financial provision are the joint responsibilities of the spouses, and that because of the spouse's implicit joint contribution to fulfilling those responsibilities, both Husband and Wife are entitled to share equally the family assets.

. This entitlement should not be limited to divorced and separated persons. It should extend as well to persons whose marriage is dissolved by death.

. It is contribution to marriage that justifies the entitlement, and not divorce or separation, so a



widowed person is just as deserving as a divorced or separated person.

. The woman's contribution is frequently non-financial. Nonetheless she has helped to accumulate assets and is entitled to an ownership interest.

The Succession Law Reform Act does not fill the gap, does not provide the right kind of help for widowed spouses:

. It responds only to "need" by ordering "support" for widowed spouses whose spouses have not made "adequate provision" for their "proper support".

. It does not entitle a widowed spouse by right to an ownership interest.

The Council proposes

A. Share family and non-family assets for widowed persons, and not just divorced and separated persons.

or

B. At least provide that a widow receive at least what she would have been given by legislative fiat had her husband not left a will - in some cases, the entire estate.

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